

rulemaking be better used to improve decisionmaking?

- What alternative models exist to improve the quality of decisionmaking and increase opportunities for citizen participation?
- What are the limitations to transparency?
- What strategies might be employed to adopt greater use of Web 2.0 in agencies?
- What policy impediments to innovation in government currently exist?
- What changes in training or hiring of personnel would enhance innovation?
- What performance measures are necessary to determine the effectiveness of open government policies?

This public process is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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*Director, Office of Science and Technology Policy.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59923; File No. SR-NASDAQ-2009-046]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Criteria for Securities That Underlie Options Traded on the Exchange

May 14, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 8, 2009, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq filed the proposed rule change as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with

the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes for NOM to modify Chapter IV, Section 3 (Criteria for Underlying Securities) and Section 4 (Withdrawal of Approval of Underlying Securities) of its options rules to: (1) Enable listing and trading of options on equity index-linked securities, commodity-linked securities, currency-linked securities, fixed income index-linked securities, futures-linked securities, and multifactor index-linked securities (collectively referred to as “Index-Linked Securities”) that are principally traded on a national securities exchange and an “NMS stock” as defined in Rule 600 of Regulation NMS; (2) enable listing and trading of options on Index Multiple Exchange Traded Fund Shares (“Index Multiple ETFs”) and Index Inverse Exchange Traded Fund Shares (“Index Inverse ETFs”); (3) enable listing and trading of options on certain funds that hold specified non-U.S. currencies (“Currency Trust Shares”); and (4) enable listing and trading of options on commodity pool interests that hold and/or manage portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency (“Commodity Pool ETFs”).

The text of the proposed rule change is available from Nasdaq’s Web site at <http://nasdaq.cchwallstreet.com>, at Nasdaq’s principal office, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

This proposed rule change is based directly on recent rule change proposals of NASDAQ OMX PHLX, Inc. (“Phlx”)<sup>5</sup> and other option exchanges.<sup>6</sup>

This rule change is being proposed, subsequent to the merger of The NASDAQ OMX Group, Inc. (“NASDAQ OMX”) and the Philadelphia Stock Exchange, Inc. (now NASDAQ OMX PHLX),<sup>7</sup> to more closely align, to the extent practicable, certain listing rules of the Exchange (NOM) and Phlx.<sup>8</sup>

Chapter IV, Sections 3 and 4 (referred to in this filing as “Sections 3 and 4” or individually as “Section 3” and “Section 4”) generally indicate on which underlying securities the Exchange may initially list and continue to list options. The purpose of the proposed rule change is to revise Sections 3 and 4 to enable the listing and trading of options on: Index-Linked Securities that are principally traded on a national securities exchange and an “NMS stock” as defined in Rule 600 of Regulation NMS; Index Multiple ETFs and Index Inverse ETFs (together known as “Multiple Inverse ETFs”); Currency

<sup>5</sup> See Securities Exchange Act Release Nos. 58571 (September 17, 2008), 73 FR 55188 (September 24, 2008) (SR-Phlx-2008-60) (notice of filing and immediate effectiveness regarding Index-Linked Securities and Currency Trust Shares); 57715 (April 25, 2009), 73 FR 23518 (April 30, 2008) (SR-Phlx-2008-30) (notice of filing and immediate effectiveness regarding Index Multiple ETFs and Index Inverse ETFs); and 55951 (June 25, 2007), 72 FR 37298 (July 9, 2007) (SR-Phlx-2007-35) (approval order regarding Commodity Pool ETFs).

<sup>6</sup> See, regarding Index-Linked Securities, Exchange Act Release Nos. 58204 (July 22, 2008), 73 FR 43807 (July 28, 2008) (SR-CBOE-2008-64) (approval order); and 58985 (November 20, 2008), 73 FR 72538 (November 28, 2008) (SR-ISE-2008-86) (notice of filing and immediate effectiveness). See also, regarding Index Multiple ETFs and Index Inverse ETFs, Exchange Act Release No. 56715 (October 29, 2007), 72 FR 62287 (November 2, 2007) (SR-CBOE-2007-119) (approval order); and 56871 (November 30, 2007), 72 FR 68924 (December 6, 2007) (SR-ISE-2007-87) (approval order). See also, regarding Commodity Pool Units (ETFs), 55630 (April 13, 2007), 72 FR 19993 (April 20, 2007) (SR-CBOE-2007-21) (approval order); and 55635 (April 16, 2007), 72 FR 19999 (April 20, 2007) (SR-ISE-2007-16) (approval order). See also, regarding Currency Trust Shares, Securities Exchange Act Release No. 54983 (December 20, 2006), 71 FR 78476 (December 29, 2006) (AMEX-2006-87) (approval order).

<sup>7</sup> See Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31). See also Securities Exchange Act Release No. 58183 (July 17, 2008), 73 FR 26182 (May 8, 2008) (SR-NASDAQ-2008-035).

<sup>8</sup> See, e.g., Securities Exchange Act Release No. 59697 (April 2, 2009), 74 FR 16249 (April 9, 2009), (SR-Phlx-2009-23) (notice of filing); and 59794 (April 20, 2009), 74 FR 18761 (April 24, 2009) (SR-Phlx-2009-17) (approval order).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

Trust Shares; and Commodity Pool ETFs.

#### Index-Linked Securities

Index-Linked Securities are designed for investors who desire to participate in a specific market segment by providing exposure to one or more identifiable underlying securities, commodities, currencies, derivative instruments or market indexes of the foregoing (“Underlying Index” or “Underlying Indexes”). Index-Linked Securities are the non-convertible debt of an issuer that have a term of at least one (1) year but not greater than thirty (30) years. Despite the fact that Index-Linked Securities are linked to an underlying index, each trades as a single, exchange-listed security. Accordingly, rules pertaining to the listing and trading of standard equity options will apply to Index-Linked Securities.

#### Listing Criteria (Index-Linked Securities)

Currently, there is no provision in the Exchange’s initial listing rules, which are found in Section 3, for trading options on Index-Linked Securities. The Exchange will consider listing and trading options on Index-Linked Securities provided that they meet the new criteria for underlying securities set forth in Section 3.

The Exchange proposes to add new subsection (l) to Section 3, which indicates that six types of Index-Linked Securities are deemed appropriate for options representing ownership of a security that provides for the payment at maturity, as described below:

(1) *Equity Index-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities (“Equity Reference Asset”);

(2) *Commodity-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of one or more physical commodities or commodity futures, options or other commodity derivatives or Commodity-Based Trust Shares or a basket or index of any of the foregoing (“Commodity Reference Asset”);

(3) *Currency-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of one or more currencies, or options or currency futures or other currency derivatives or Currency Trust Shares<sup>9</sup> or a basket or

index of any of the foregoing (“Currency Reference Asset”);

(4) *Fixed Income Index-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of one or more notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities (“Treasury Securities”), government sponsored entity securities (“GSE Securities”), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or a subdivision thereof or a basket or index of any of the foregoing (“Fixed Income Reference Asset”);

(5) *Futures-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of an index of (a) futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; or (b) interest rate futures or options or derivatives on the foregoing in this subparagraph (b) (“Futures Reference Asset”); and

(6) *Multifactor Index-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of any combination of two or more Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets or Futures Reference Assets (“Multifactor Reference Asset”). For the purposes of Section 3(l), Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets and Multifactor Reference Assets, will be collectively referred to as “Reference Assets.” Index-Linked Securities must meet the criteria and guidelines for underlying securities set forth in Section 3(b), or the Index-Linked Securities must be redeemable at the option of the holder at least on a weekly basis through the issuer at a price related to the applicable underlying Reference Asset. In addition, the issuing company is obligated to issue or repurchase the securities in aggregation units for cash or cash equivalents satisfactory to the issuer of Index-Linked Securities which underlie

owner to receive the specified non-U.S. currency or currencies; and (c) pays the beneficial owner interest and other distributions on deposited non-U.S. currency or currencies, if any, declared and paid by the trust. See proposed Section 3(i), which is based on Commentary .06 to Phlx Rule 1009. See also Securities Exchange Act Release No. 58571 (September 17, 2008), 73 FR 55188 (September 24, 2008)(SR-Phlx-2008-60)(notice of filing and immediate effectiveness).

the option as described in the Index-Linked Securities prospectus.

#### Continued Listing Requirements (Index-Linked Securities)

The Exchange proposes to establish new Section 4(k), which will include criteria related to the continued listing of options on Index-Linked Securities.

Under the applicable continued listing criteria proposed in Section 4(k), options on Index Linked Securities initially approved for trading pursuant to proposed Section 3(l) may be subject to the suspension of opening transactions as follows: (1) Non-compliance with the terms of Section 3(l); (2) non-compliance with the terms of Section 4(b), except in the case of options covering Index Linked Securities approved pursuant to Section 3(l)(iii)<sup>2</sup> that are redeemable at the option of the holder at least on a weekly basis, then option contracts of the class covering such securities may only continue to be open for trading as long as the securities are listed on a national securities exchange and are an “NMS stock” as defined in Rule 600 of Regulation NMS; (3) in the case of any Index-Linked Security trading pursuant to Section 3(l), the value of the Reference Asset is no longer calculated or available; or (4) such other event shall occur or condition exist that in the opinion of the Exchange makes further dealing in such options on the Exchange inadvisable.

The Exchange represents that the listing and trading of options on Index-Linked Securities under Section 3(l) will not have any effect on the rules pertaining to position and exercise limits<sup>10</sup> or margin.<sup>11</sup> Options on Index-Linked Securities will be subject to all rules governing the trading of equity options and the current continuing or maintenance listing standards for options trading on the Exchange.

The Exchange represents that its existing surveillance procedures applicable to trading in options are adequate to properly monitor the trading in options on Index-Linked Securities and to deter and detect violations of Exchange rules.<sup>12</sup>

<sup>9</sup> “Currency Trust Shares” is defined as a security that: (a) Holds a specified non-U.S. currency deposited with the trust or similar entity; (b) when aggregated in some specified minimum number may be surrendered to the trust by the beneficial

<sup>10</sup> See NOM Rules Chapter III, Sections 7 and 8; Chapter XIV, Sections 7 and 8; Chapter III, Section 9; and Chapter XIV, Section 9.

<sup>11</sup> See NOM Rules Chapter VIII.

<sup>12</sup> See, e.g., Section 3(l)(iv)(discussing, among other things, comprehensive surveillance agreements).

## Index Multiple ETFs and Index Inverse ETFs

Index Multiple ETFs<sup>13</sup> seek to provide investment results, before fees and expenses, that correspond to a specified multiple of the percentage performance on a given day of a particular foreign or domestic stock index. Index Inverse ETFs seek to provide investment results, before fees and expenses, that correspond to the inverse (opposite) of the percentage performance on a given day of a particular foreign or domestic stock index by a specified multiple. Index Multiple ETFs and Index Inverse ETFs differ from traditional exchange-traded fund shares in that they do not merely correspond to the performance of a given index, but rather attempt to match a multiple or inverse of such underlying index performance.<sup>14</sup> The ProShares Ultra Funds, which currently trade on NYSE Arca and traded on the American Stock Exchange (“Amex”), is an example of an Index Multiple ETF. NYSE Arca also currently lists for trading Index Inverse ETFs, namely the Short Funds and the UltraShort Funds.<sup>15</sup>

Generally, in order to achieve investment results that provide either a positive multiple or inverse of the benchmark index, Index Multiple ETFs or Index Inverse ETFs may hold a combination of financial instruments, including, among other things: Stock index futures contracts; options on futures; options on securities and indexes; equity caps, collars and floors; swap agreements; forward contracts; repurchase agreements; and reverse repurchase agreements. The underlying portfolios of Index Multiple ETFs generally will hold at least 85% of their assets in the component securities of the underlying relevant benchmark index.

<sup>13</sup> ETFs are also known as “Fund Shares” or “Funds;” these terms may be used interchangeably.

<sup>14</sup> Index Multiple ETFs and Index Inverse ETFs together may be known as “Multiple-Inverse ETFs.”

<sup>15</sup> See Securities Exchange Act Release Nos. 52553 (October 3, 2005), 70 FR 59100 (October 11, 2005)(SR-AMEX-2004-62)(approving the listing and trading of Ultra Funds and Short Funds) and 54040 (June 23, 2006), 71 FR 37629 (June 30, 2006)(SR-AMEX-2006-41)(approving the listing and trading of the UltraShort Funds). The Ultra Funds are expected to gain, on a percentage basis, approximately twice (200%) as much as the underlying benchmark index and should lose approximately twice (200%) as much as the underlying benchmark index when such prices decline. The Short Funds are expected to achieve investment results, before fees and expenses, that correspond to the inverse or opposite of the daily performance (–100%) or an underlying benchmark index. Lastly, the UltraShort Funds are expected to achieve investment result, before fees and expenses, that correspond to twice the inverse or opposite of the daily performance (–200%) of the underlying benchmark index.

The remainder of any assets is devoted to Financial Instruments that are intended to create the additional needed exposure to such underlying index necessary to pursue its investment objective. Normally, 100% of the value of the underlying portfolios of Index Inverse ETFs will be devoted to Financial Instruments and money market instruments, including U.S. government securities and repurchase agreements.

### Listing Criteria (Index Multiple ETFs and Index Inverse ETFs)

Currently, there is no provision in the Exchange’s initial listing rules for trading options on Index Multiple ETFs or Index Inverse ETFs. Section 3(i) currently provides that securities deemed appropriate for options trading shall include shares or other securities (“Fund Shares”) that represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that are principally traded on a national securities exchange or through the facilities of a national securities association and reported as “national market” securities, and that hold portfolios of securities comprising or otherwise based on or representing investments in indexes or portfolios of securities (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities) (“Funds”) or represent interests in the SPDR Gold Trust.<sup>16</sup>

The Exchange proposes to amend Section 3(i) to indicate that Index Multiple ETFs or Index Inverse ETFs are deemed appropriate for options trading. Section 3(i) is expanded to indicate that options eligible for listing and trading include those that are based on Index Multiple ETFs and Index Inverse ETFs that may hold or invest in any combination of securities, Financial Instruments and/or Money Market Instruments.<sup>17</sup>

As further set forth in proposed amended Section 3(l), securities deemed appropriate for options trading (Fund

<sup>16</sup> Similarly to Commentary .06 to Phlx Rule 1009, the Exchange proposes to indicate in Section 3(i) that these interests may be in the SPDR Gold Trust or issued by the iShares COMEX Gold Trust or iShares Silver Trust.

<sup>17</sup> “Financial Instruments” are defined to include stock index futures contracts, options on futures, options on securities and indexes, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements. “Money Market Instruments” are defined to include U.S. government securities and repurchase agreements. See Section 3(i), which is based on Commentary .06 to Phlx Rule 1009.

Shares) that may include Partnership Units,<sup>18</sup> Index Multiple ETFs and Index Inverse ETFs must be traded on a national securities exchange and must be an “NMS stock” as defined under Rule 600 of Regulation NMS. In addition, securities deemed appropriate for options trading must meet either: (i) The criteria and guidelines under Chapter 3, Section 3(b); or (ii) be available for creation or redemption each business day in cash or in kind from the investment company, commodity pool<sup>19</sup> or other entity at a price related to net asset value. In addition, the investment company, commodity pool or other entity shall provide that shares may be created even though some or all of the securities and/or cash (in lieu of the Financial Instruments) needed to be deposited have not been received by the unit investment trust or the management investment company, provided the authorized creation participant has undertaken to deliver the shares and/or cash as soon as possible and such undertaking has been secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the fund which underlies the option as described in the prospectus.

The Exchange proposes to also make clarifying changes to Section 3(i) to conform it to Commentary .06 of Phlx Rule 1009, as well as the rules of other option exchanges, regarding interests in a fund or trust that holds a specified non-U.S. currency or currencies, and surveillance agreements in respect thereof.<sup>20</sup> Thus, the Exchange proposes to amend its Section 3(i) to expand the type of options to include options on funds (trusts) that represent an interest in a trust or other similar entity that holds specified non-U.S. currency or currencies deposited with the trust or

<sup>18</sup> “Partnership Unit” is defined as a security that: (a) Is issued by a partnership that invests in any combination of futures contracts, options on futures contracts, forward contracts, commodities (as defined in Section 1(a)(4) of the Commodity Exchange Act) and/or securities; and (b) is issued and redeemed daily in specified aggregate amounts at net asset value. See proposed Section 3(m), which is based on Commentary .06 to Phlx Rule 1009.

<sup>19</sup> Commodity pool interests that are principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency are known as “Commodity Pool ETFs.” See Chapter IV, Section 3(i), which is based on Commentary .06 to Phlx Rule 1009.

<sup>20</sup> Section 3(i) as proposed, and Commentary .06 to Phlx Rule 1009, are substantially similar to Interpretation and Policy .06(ii) and (v)(D) to CBOE Rule 5.3 and ISE Rule 502(h)(ii) and (h)(B)(4).

similar entity (Currency Trust Shares). The Exchange is also proposing to require in Section 3(i)(iv) that for Funds that hold specified non-U.S. currencies deposited with the trust, the Exchange will have entered into a comprehensive surveillance sharing agreement with the marketplace or marketplaces with last sale reporting that represent(s) the highest volume in derivatives (options or futures) on the non-U.S. currency or currencies, which are utilized by the national securities exchange where the underlying Funds are listed and traded.<sup>21</sup>

#### Continued Listing Requirements (Index Multiple ETFs and Index Inverse ETFs)

The Exchange proposes to amend Section 4 to indicate that the index or portfolio may consist of various securities, Financial Instruments and/or Money Market Instruments. The Exchange proposes to clarify that the relevant instruments have to be an "NMS stock" under Rule 600 of Regulation NMS. Under the applicable continued listing criteria in Section 4(h), options on ETFs may be subject to the suspension of opening transactions as follows: (1) Following the initial twelve-month period beginning upon the commencement of trading of the ETFs, there are fewer than 50 record and/or beneficial holders of the ETFs for 30 or more consecutive trading days; (2) the value of the index or portfolio of securities, non-U.S. currency, or portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or Financial Instruments and Money Market Instruments on which Fund Shares (ETFs) are based is no longer calculated or available; or (3) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing in such options inadvisable.<sup>22</sup> Section 4(h) is expanded, similarly to Section 3(i), to indicate that options

eligible for continued listing and trading include those that are based on Index Multiple ETFs and Index Inverse ETFs that may hold or invest in any combination of securities, Financial Instruments and/or Money Market Instruments.

The Exchange represents that the listing and trading of options on Index Multiple ETFs and Index Inverse ETFs will not have any effect on the rules pertaining to position and exercise limits<sup>23</sup> or margin.<sup>24</sup> Options on Index Multiple ETFs and Index Inverse ETFs will be subject to all rules governing the trading of equity options and the current continuing or maintenance listing standards for options trading on the Exchange.

This proposal is necessary to enable the Exchange to list and trade options on the shares of funds such as the Short Fund and UltraShort Fund of the ProShares Trust.<sup>25</sup> The proposed amendment is also necessary to enable the Exchange to continue to list and trade interests in Funds that hold specified non-U.S. currencies. The Exchange believes that the ability to trade options on these products will provide investors with greater risk management tools.

The Exchange represents that its existing surveillance procedures applicable to trading in options are adequate to properly monitor the trading in options on Index Multiple ETFs and Index Inverse ETFs and to deter and detect violations of Exchange rules.<sup>26</sup>

#### Commodity Pool ETFs

Commodity Pool ETFs directly or indirectly trade commodity futures products. As such, Commodity Pool ETFs are subject to the Commodity Exchange Act due to their status as a commodity pool,<sup>27</sup> and therefore are regulated by the Commodity Futures Trading Commission ("CFTC").<sup>28</sup>

Commodity Pool ETFs may hold or trade in one or more types of investments that may include any combination of securities, commodity futures contracts, options on commodity futures contracts, swaps, and forward contracts.

#### Listing Criteria and Continued Listing Requirements (Commodity Pool ETFs)

Currently, there is no provision in the Exchange's initial listing rules for trading options on Commodity Pool ETFs.

The Exchange proposes to amend Section 3(i) to indicate that, similarly to Index-Linked Securities and Index Multiple ETFs and Index Inverse ETFs, Commodity Pool ETFs are deemed appropriate for options trading. As such, Commodity Pool ETFs are proposed to represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency.<sup>29</sup> To be eligible for options trading, Commodity Pool ETFs, like other option eligible securities, must be registered with the SEC and be an "NMS stock" as defined in Rule 600 of Regulation NMS under the Exchange Act.

The Exchange also proposes in Section 3 to establish a comprehensive surveillance agreement requirement for Commodity Pool ETFs.<sup>30</sup> The Exchange represents that its existing surveillance procedures applicable to trading in options are adequate to properly monitor the trading in options on Commodity Pool ETFs and to deter and detect violations of Exchange rules.

The listing and trading of options on Commodity Pool ETFs will not have any

exclusions apply, as a commodity pool operator ("CPO") and commodity trading advisor ("CTA") with the CFTC and become a member of the National Futures Association ("NFA").

<sup>29</sup> See Section 3(i)(ii), which is based on Commentary .06 to Phlx Rule 1009. See also 55951 (June 25, 2007), 72 FR 37298 (July 9, 2007) (SR-Phlx-2007-35).

<sup>30</sup> For Commodity Pool ETFs that engage in holding and/or managing portfolios or baskets commodity futures contracts, options on commodity futures contracts, swaps, forward contracts, options on physical commodities, options on non-U.S. currency and/or securities, the Exchange has entered into a comprehensive surveillance sharing agreement with the marketplace or marketplaces with last sale reporting that represent(s) the highest volume in such commodity futures contracts and/or options on commodity futures contracts on the specified commodities or non-U.S. currency, which are utilized by the national securities exchange where the underlying Commodity Pool ETFs are listed and traded. See Section 3(i)(iv), which is based on Commentary .06(b) to Phlx Rule 1009.

<sup>21</sup> See, e.g., Securities Exchange Act Release No. 54983 (December 20, 2006), 71 FR 78476 (December 29, 2006)(AMEX-2006-87). AMEX noted in the filing that the proposed amendments to its Rule 915 would permit it to list options on products such as the Euro Currency Trust, which issues Euro Shares that represent units of fractional undivided beneficial interest in, and ownership of, the noted trust; and that the investment objective of the trust was for the Euro Shares to reflect the price of the euro.

<sup>22</sup> As discussed in detail below, the Exchange will not open for trading any additional series of equity options already approved for trading that do not meet the requirements for continued approval and may determine to delist the entire class of options for inadequate volume. See proposed Section 4(l), which is based on Commentary .11 to Phlx Rule 1010.

<sup>23</sup> See NOM Rules Chapter III, Sections 7 and 8; Chapter XIV, Sections 7 and 8; Chapter III, Section 9; and Chapter XIV, Section 9.

<sup>24</sup> See NOM Rules Chapter VIII.

<sup>25</sup> See Securities Exchange Act Release Nos. 52553 (October 3, 2005), 70 FR 59100 (October 11, 2005)(SR-AMEX-2004-62 and 54040 (June 23, 2006), 71 FR 37629 (June 3)(SR-AMEX-2006-41).

<sup>26</sup> See, e.g., Section 3(i)(i)(discussing, among other things, comprehensive surveillance agreements).

<sup>27</sup> A "commodity pool" is defined in CFTC Regulation 4.10(d)(1) as any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading commodity interests. CFTC regulations further provide that a "commodity interest" means a commodity futures contract and any contract, agreement or transaction subject to Commission regulation under section 4c or 19 of the Act. See CFTC Regulation 4.10(a).

<sup>28</sup> The manager or operator of a "commodity pool" is required to register, unless applicable

effect on the rules pertaining to position and exercise limits<sup>31</sup> or margin.<sup>32</sup> Options on Commodity Pool ETFs will be subject to all rules governing the trading of equity options and the current continuing or maintenance listing standards for options trading on the Exchange.

#### Inadequate Volume Delisting

In terms of housekeeping, the Exchange proposes to amend Section 4 so that the Exchange may delist options that have inadequate trading volume, similarly to Phlx and other option exchanges.<sup>33</sup>

Section 4(l), which is based on Commentary .11 to Phlx Rule 1010,<sup>34</sup> would allow the Exchange to cease listing additional series of equity options and to delist the class of equity options where the option has been trading on the Exchange not less than six (6) months and the Exchange average daily volume ("ADV") of the entire class of options was less than twenty (20) contracts over the last six (6) month period. The proposal also would provide that if an option is singly listed only on the Exchange, the Exchange will cease to add new series and may delist the option when there is no remaining open interest in the product. Should the Exchange determine to delist an equity option pursuant to subsection (l) of Section 4, it will provide notification of the determination to delist such option not less than three (3) days prior to the scheduled delisting date.

The Exchange believes that its low ADV delisting proposal is consistent with the Exchange's maintenance and delisting criteria in Section 4 and should reduce or eliminate the quotation traffic attendant to low volume options listings that may nevertheless experience significant quoting activity. This should, in turn, diminish the total number of strikes that need to be maintained by the Exchange and potentially may thereby reduce

technology costs for the Exchange and its member organizations and free up Exchange capacity. The Exchange further believes that expanding its ability to manage quotation traffic should benefit not only the Exchange and its members, but also public and professional traders and ultimately the industry.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>35</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>36</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes that the proposed rules applicable to trading Index-Linked Securities, Multiple-Inverse ETFs, Currency Trust Shares, and Commodity Pool ETFs, together with the Exchange's surveillance procedures applicable to trading in the securities covered by the proposed rules, serve to foster investor protection.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>37</sup> and Rule 19b-4(f)(6) thereunder.<sup>38</sup>

<sup>35</sup> 15 U.S.C. 78f(b).

<sup>36</sup> 15 U.S.C. 78f(b)(5).

<sup>37</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>38</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that the Exchange can list and trade options on Index-Linked Securities, Index Multiple ETFs, Index Inverse ETFs, Currency Trust Shares, and Commodity Pool ETFs immediately. The Commission notes the proposal is substantively identical to rules of other exchanges that have been previously approved by the Commission and does not raise any new regulatory issues.<sup>39</sup> In addition, the proposal would allow Nasdaq to list and trade products that currently trade on other options exchanges. The Commission believes that waiving the 30-day operative delay to permit the listing and trading of options on these products on an additional exchange as soon as possible is consistent with the protection of investors and the public interest.<sup>40</sup> For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

<sup>39</sup> See e.g., NASDAQ OMX PHLX Rules 1009 and 1010; Chicago Board Options Exchange Rules 5.3 and 5.4, and International Securities Exchange Rules 502 and 503.

<sup>40</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>31</sup> See NOM Rules Chapter III, Sections 7 and 8; Chapter XIV, Sections 7 and 8; Chapter III, Section 9; and Chapter XIV, Section 9.

<sup>32</sup> See NOM Rules Chapter VIII.

<sup>33</sup> See Securities Exchange Act No. 56881 (December 3, 2007), 72 FR 69276 (December 7, 2007) (SR-Phlx-2007-72) (approval order regarding delisting equity options classes where average daily volume is less than 20 contracts). Other options exchanges have similar delisting provisions. See Securities Exchange Act Release Nos. 55154 (January 23, 2007), 72 FR 4743 (February 1, 2007) (SR-CBOE-2006-92) (delisting equity options classes where ADV is less than 20 contracts); and 55161 (January 24, 2007), 72 FR 4754 (February 1, 2007) (SR-ISE-2006-62) (delisting equity options classes where ADV is less than 20 contracts).

<sup>34</sup> See Securities Exchange Act No. 56881 (December 3, 2007), 72 FR 69276 (December 7, 2007) (SR-Phlx-2007-72).

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2009-046 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2009-046. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2009-046 and should be submitted on or before June 11, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>41</sup>

**Florence E. Harmon,**  
*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-59917; File Nos. SR-DTC-2009-07, SR-FICC-2009-06, SR-NSCC-2009-03]

**Self-Regulatory Organizations; The Depository Trust Company, Fixed Income Clearing Corporation, and National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Changes Relating to Economic Sanctions and Embargo Programs Administered and Enforced by the Office of Foreign Assets Control**

May 14, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on March 31, 2009, April 1, 2009, and April 22, 2009, the Fixed Income Clearing Corporation ("FICC"), the National Securities Clearing Corporation ("NSCC"), and The Depository Trust Company ("DTC"), respectively, filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Item I, II, and III, below, which Items have been prepared primarily by FICC, NSCC, and DTC (collectively, "Clearing Agencies"). The Clearing Agencies filed the proposed rule changes pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>2</sup> and Rule 19b-4(f)(4) thereunder<sup>3</sup> so that the proposals were effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

**I. Self-Regulatory Organizations' Statement of Terms of Substance of the Proposed Rule Changes**

The Clearing Agencies are adding language to their rules to make clear that the Clearing Agencies' participants, members, and pledgees (collectively, "members") must comply with the U.S. Department of the Treasury's Office of Foreign Asset Control's ("OFAC") sanctions and embargo programs and as part of their compliance with OFAC sanctions regulations must agree not to conduct any transaction or activity through the Clearing Agencies that violate OFAC regulations.

**II. Self-Regulatory Organizations' Statement of Purpose of, and Statutory Basis for, the Proposed Rule Changes**

In their filing with the Commission, the Clearing Agencies included

statements concerning the purpose of and basis for the proposed rule changes and discussed any comments they received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Clearing Agencies have prepared summaries, set forth in Section A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organizations' Statement of Purpose of, and Statutory Basis for, the Proposed Rule Changes*

The purpose of these rule filings is to add new language to the Clearing Agencies' rules<sup>4</sup> to clarify that the Clearing Agencies' members must comply with OFAC's sanctions and embargo programs and as part of their compliance with OFAC sanctions regulations must agree not to conduct any transaction or activity through the Clearing Agencies that violate such OFAC regulations.

In addition, members subject to United States jurisdiction must confirm to the Clearing Agencies that it has implemented a risk-based OFAC compliance program. The Clearing Agencies will require each member to execute a "Confirmation of an OFAC Program" letter ("OFAC Letter"), which will serve to confirm that the member has "implemented a risk-based program reasonably designed to comply with applicable OFAC sanctions regulations."<sup>5</sup> Each U.S. member's OFAC Compliance Officer, Chief Compliance Officer, or other individual with responsibility for managing the OFAC compliance program will be required to submit the OFAC Letter at least every two years.<sup>6</sup> Failure to properly submit the OFAC Letter to the Clearing Agencies will result in a \$5,000 fine.

The Clearing Agencies state that the proposed rule changes are consistent with the requirements of Section 17A of the Act<sup>7</sup> and the rules and regulations thereunder because such changes will enhance the Clearing Agencies' ability to comply with applicable laws thereby reducing risks and associated costs to the Clearing Agencies and their participants.

<sup>4</sup> FICC is amending Government Securities Division Rule 3, Section 9, and Mortgage-Backed Securities Division Article III, Rule 1, Section 7. NSCC is amending Rule 2, Section 4. DTC is amending Rule 2, Section 8.

<sup>5</sup> The OFAC Letter is not intended to reallocate legal liability related to the sanctions administered and enforced by OFAC.

<sup>6</sup> The form of the OFAC Letter is attached to each of the clearing agencies' rule filings with the Commission.

<sup>7</sup> 15 U.S.C. 78q-1.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>3</sup> 17 CFR 240.19b-4(f)(4).

<sup>41</sup> 17 CFR 200.30-3(a)(12).